Supreme Court, U.S.
FILED

971242 JAN 27 1998

OFFICE OF THE CLERK

No.___

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

KENNAMETAL, INC.,
*Petitioner*,

v.

COMMISSIONER OF REVENUE
FOR THE COMMONWEALTH OF MASSACHUSETTS,
*Respondent.*

**On Petition for Writ of Certiorari To the Supreme Judicial Court of the Commonwealth of Massachusetts**

## PETITION FOR WRIT OF CERTIORARI

William E. Halmkin
(Counsel of Record)
Arthur A. Hundhausen
Robert M. Finkel
Hutchins, Wheeler & Dittmar
A Professional Corporation
101 Federal Street
Boston, Massachusetts 02110

75 pp

## QUESTIONS PRESENTED

1. Whether the Massachusetts Supreme Judicial Court properly followed this Court's interpretation of Public Law No. 86-272 (codified at 15 U.S.C. § 381 (1994)) as set forth in *Wisconsin Dep't. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992)?

2. Whether the Massachusetts Supreme Judicial Court violated the standards set forth by this Court in *Wisconsin Dep't. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992), by holding that activities designed "to ingratiate customers and to assist buyers in knowing what to order" and "generally, to increase sales" exceeded the protection of Public Law 86-272?

## PARTIES

The petitioner is Kennametal, Inc., a corporation organized under the laws of the Commonwealth of Pennsylvania and headquartered in that Commonwealth. Kennametal, Inc. has no parent company. Kennametal has numerous subsididary corporations, however, only two are publicly traded: JLK Direct Distribution, Inc., a corporation organized under the laws of the Commonwealth of Pennsylvania, and Kennametal Hertel, AG, a corporation organized under the laws of the Federal Republic of Germany.

The petitioner was the appellant before the Appellate Tax Board of the Commonwealth of Massachusetts, and plaintiff/appellant before the Supreme Judicial Court of the Commonwealth of Massachusetts.

The respondent is the Commissioner of Revenue for the Commonwealth of Massachusetts.

The respondent was the appellee before the Appellate Tax Board of the Commonwealth of Massachusetts, and defendant/appellee before the Supreme Judicial Court of the Commonwealth of Massachusetts.

# TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

PARTIES ..... ii

TABLE OF AUTHORITIES ..... v

INTRODUCTION ..... 1
OPINIONS BELOW ..... 2
JURISDICTION ..... 2
CONSTITUTIONAL PROVISIONS INVOLVED ..... 2
FEDERAL STATUTES INVOLVED ..... 3
STATEMENT OF THE CASE ..... 3

Kennametal's Business ..... 3
The Massachusetts Corporate Excise Tax ..... 6
Proceedings Below ..... 6

REASONS FOR GRANTING THE WRIT ..... 11

I. The decision of the Massachusetts court conflicts with a previous decision of this Court on an important federal issue. ..... 11

CONCLUSION ..... 25

APPENDIX:

FINDINGS OF FACT AND REPORT, COMMONWEALTH OF MASSACHUSETTS APPELLATE TAX BOARD (Nov. 1, 1996) ..... 2a

OPINION, SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS (Oct. 29, 1997) ..... 24a

15 U.S.C. § 381 (1994) - (PUBLIC LAW 86-272) ..... 37a

MASSACHUSETTS GENERAL LAWS, CHAPTER 63, SECTION 39 ..... 40a

# TABLE OF AUTHORITIES

Cases — Page

## FEDERAL CASES

*Heublein, Inc. v. S. Carolina Tax Commission*, 409 U.S. 275 (1972) ..... 12, 13

*Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959) ..... 12

*Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992) ..... 2, passim

## STATE CASES

*Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La. 651, 101 So.2d 70 (1958), *appeal dism'd*, 359 U.S. 28 (1959) ..... 12

*Clairol, Inc. v. Kingsley*, 109 N.J. Super. 22, 262 A.2d 213, *aff'd*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dism'd*, 402 U.S. 902 (1971) ..... 20

*Gillette Co. v. State Tax Commission*, 56 A.D.2d 475, 393 N.Y.S.2d 186 (1977) ..... 23

*Hervey v. AMF Beaird, Inc.*, 250 Ark. 147, 464 S.W.2d 557 (1971) ..... 20

*International Shoe Co. v. Fontenot*, 236 La. 279, 107 So.2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959) .... 12

*Kennametal v. Commissioner of Revenue*,
426 Mass. 39, 686 N.E.2d 436 (1997) ..... 2, passim

*Kennametal v. Commissioner of Revenue*, 20 Mass.
App. Tax Bd. Rep. 6 (Nov. 1, 1996) (Michie),
*aff'd* 426 Mass. 39, 686 N.E.2d 436 (1997) ..... 2, passim

## FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. I, § 8, cl. 3 ..... 2

15 U.S.C. § 381 (Pub. L. 86-272) ..... 3, passim

28 U.S.C., § 1257(a) ..... 2

28 U.S.C. § 2101(c) ..... 2

## STATE STATUTES

Mass. Gen. Laws ch. 63, § 39 ..... 6

Mass. Gen. Laws ch. 63, § 39(a) ..... 6

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

---

No. _____

---

KENNAMETAL, INC.,
*Petitioner,*

v.

COMMISSIONER OF REVENUE
FOR THE COMMONWEALTH OF MASSACHUSETTS,
*Respondent.*

---

**On Petition for Writ of Certiorari
To the Supreme Judicial Court of the
Commonwealth of Massachusetts**

---

## PETITION FOR WRIT OF CERTIORARI

---

## INTRODUCTION

Petitioner, Kennametal, Inc. ("Kennametal"), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts (the "Massachusetts court")

entered on October 29, 1997. The Massachusetts court decided a constitutional question contrary to this Court's specific standards set forth in *Wisconsin Dep't. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992) (hereinafter referred to as "*Wrigley*").

## OPINIONS BELOW

The opinion of the Massachusetts court is reported at 426 Mass. 39, 686 N.E.2d 436 (1997), and is reprinted in the Appendix at 24a

The opinion of the Appellate Tax Board for the Commonwealth of Massachusetts (the "board") is reported at 20 Mass. App. Tax Bd. Rep. 6 (Nov. 1, 1996) (Michie), and is reprinted in the Appendix at 2a.

## JURISDICTION

The opinion of the Massachusetts court was rendered on October 29, 1997. No rehearing was requested. This Petition is filed within 90 days of the Massachusetts court's judgment as allowed by 28 U.S.C. § 2101(c) and U.S. Supreme Court Rule 13.1.

The jurisdiction of this Court to review the judgment of the Massachusetts court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Commerce Clause, art. 1, sec. 8, cl. 3, of the United States Constitution.

## FEDERAL STATUTES INVOLVED

This case involves Public Law No. 86-272, codified at 15 U.S.C. § 381 (1994) (hereinafter referred to as Section 381).

The text of this statute and pertinent sections of the Massachusetts corporate excise tax statute are reported in the Appendix at 37a-42a.

## STATEMENT OF THE CASE

### *Kennametal's Business*

Kennametal is a multi-national corporation, organized under the laws of the Commonwealth of Pennsylvania and headquartered in that Commonwealth. Kennametal is engaged in the development, manufacture, and sale of cutting bits and related products for the manufacture of metals, alloys and plastics. Kennametal's product line consists of approximately 20,000 different types of carbide cutting bits and accessories.[1]

During the period in question, from 1975 to 1989, Kennametal conducted business in Massachusetts through the use of a direct field sales force. The sales force consisted primarily of what Kennametal called tooling system engineers ("TSEs") and service engineers ("SEs"). None of these so-

---

[1] Cutting bits are small inert pieces of material with no movable parts. Their life expectancy ranges from a few minutes to no more than a day, with an average life expectancy of eight (8) minutes.

called engineers were in fact licensed engineers or even college graduates. They were typically high school graduates with varying machine shop experience.

TSEs were experienced personnel responsible for maintaining customer accounts. TSEs regularly visited current and prospective customers to solicit orders, conduct presentations of new products, and to provide limited technical information regarding the specific application of various types of cutting bits. SEs were less experienced personnel who did not have responsibility for customer accounts and whose primary function was to assist TSEs.

Also during the period in question, Kennametal held no property in Massachusetts other than its sales catalogues, automobiles (which Kennametal leased for use by its sales force), and samples of cutting bits which the sales force supplied free of charge in connection with its customer visits.

Kennametal is engaged in a highly competitive industry and on balance its products are on the high end of the market. Thus, Kennametal's business requires a concerted sales effort. During the years in question, the Massachusetts direct field sales force of Kennametal engaged in a number of activities specifically designed to solicit orders of cutting bits in this highly competitive market.

At issue in this case is the nature of several activities engaged in by Kennametal's sales force, namely: (1) the use of cutting bit samples to allow Kennametal customers to

compare the performance of Kennametal's cutting bits[2] to competitors' bits, (2) the provision to customers of assistance and guidance, (so-called "technical advice") in selecting the proper cutting bit to purchase from the 20,000 different cutting bits and accessories offered for sale by Kennametal, (3) the identification of competitors' cutting bits being used by customers, in order to suggest alternative Kennametal cutting bits to purchase so as to "standardize" customers' product lines, (4) the provision of in-plant "training" presentations in which Kennametal introduced new products to the market or targeted various industries with a specialized line of Kennametal products, and (5) the assistance provided to dissatisfied customers in choosing different Kennametal products to purchase (so-called "technical advice"), so that those customers could achieve optimum results from Kennametal products.

---

[2] The testing of cutting bits was performed by customers and recorded by the Kennametal sales force. The results achieved from testing samples were provided to customers at no charge and were recorded on "Tool Performance Reports" to allow customers to compare the performance of Kennametal cutting bits to the performance of competitor cutting bits already in use by the customer. Kennametal cutting bits' life expectancies range from a few minutes to a day--with an average life expectancy of eight minutes. The Tool Performance Report was used to record both the length of time a Kennametal cutting bit lasted during a given application, and the length of time a competitor's cutting bit lasted during the same application.

### *The Massachusetts Corporate Excise Tax*

The Commonwealth of Massachusetts levies a corporate excise tax on any foreign corporation that is "exercising its charter, or qualified to do business or actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth . . ." Mass. Gen. Laws ch. 63, § 39 (West 1996).

The term "doing business" as used in the Massachusetts corporate excise tax statute "shall mean and include each and every act, power, right, privilege or immunity exercised or enjoyed in the commonwealth, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property." Mass. Gen. Laws ch. 63, § 39(a) (West 1996).

### *Proceedings Below*

In 1963, Kennametal received a ruling from the Massachusetts Commissioner of Revenue (the "Commissioner") that Kennametal's activities in the Commonwealth at that time did not subject Kennametal to the corporate excise tax. Accordingly, Kennametal stopped filing tax returns in Massachusetts subsequent to 1963.

In March of 1984, the Commissioner issued a letter ruling holding that the use of company cars within the Commonwealth by employees of a foreign corporation exceeded the protection afforded by Section 381(a)(1) thereby subjecting the corporation to the Massachusetts corporate

excise tax. *See* LR 84-1, revoked by LR 88-7, 3 Mass. Tax Guide at 567, 615 (West 1997). Consequently, Kennametal resumed filing Massachusetts corporate excise tax returns for its 1985 and subsequent tax years. In 1987, the Commissioner commenced an audit of Kennametal that resulted in the assessment of additional taxes and penalties for the tax years 1976 through 1984. During this period, the Commissioner rescinded his letter ruling, and held that the use of company cars within Massachusetts by employees of a foreign corporation did not subject that corporation to the Massachusetts corporate excise tax. *See* DOR Directive 88-8, 3 Mass. Tax Guide at 486 (West 1997). Kennametal timely filed requests for abatement of tax for all relevant tax years. The Commissioner abated penalties for tax years 1976 through 1985, but denied the remainder of the abatement requests.

Kennametal appealed to the board which, by its decision dated November 1, 1996 (the "board's Decision"), affirmed the Commissioner's determination. The board found that Kennametal's activities within Massachusetts during the periods at issue exceeded the "solicitation of orders" of tangible personal property and were not otherwise ancillary to the solicitation of orders, or *de minimis*, and therefore did not fall within the immunity from taxation afforded by Section 381(a)(1). Specifically, the board found that Kennametal:

> [U]ndertook a number of programs to demonstrate to their customers why their products were superior. . . .These programs were not only limited to new customers, but would also be performed on behalf of existing

> customers, in an attempt to maximize customer satisfaction and to potentially expand Kennametal's market share. For example, Kennametal had their field personnel conduct tooling-product-application studies, called "Tooling Performance Reports," on behalf of their customers, to demonstrate to their customers the superiority of Kennametal products.

20 Mass. App. Tax Bd. Rep 6, 8 (Nov. 1, 1996) (Michie).

The board also found that addressing customer complaints concerning poor performance of Kennametal cutting bits by asking what speed or feed the machine was being run at to ensure that the cutting bit was being used properly (or by suggesting the purchase of new or superior cutting bits to perform the application) went beyond the protection of Section 381. The board stated:

> Although Kennametal did not make physical repairs after the sale, by providing technical assistance as to the proper application of the product after the sale, and completing tool performance reports and tool standardization programs in which Kennametal employees suggested operational and/or product changes, Kennametal's activities are akin to post sale "repairs."

*Id.* at 14.

The board found that Kennametal sales personnel, in suggesting new and improved products to purchase, providing samples to test Kennametal products against competitors' cutting bits in use by the customer and reducing the results of these performance tests to a simple report to justify the purchase of Kennametal cutting bits over those of competitors, went beyond the protection of Section 381. The board stated:

> Although Kennametal's activities may have had the effect of helping to enhance future sales and ultimately increase its market share, they were not *entirely ancillary* to the solicitation of orders. The activities obviously ingratiated the salesmen, but quite clearly had an "independent business function."

*Id.* at 16 (emphasis in original).

Kennametal timely filed a Notice of Appeal with the board on November 6, 1996. The appeal was perfected by filing an Entry of Appeal with the Massachusetts Appeals Court on December 2, 1996 and the case was entered on the court's docket on December 2, 1996. On March 14, 1997, the Commissioner through the Commonwealth's Attorney General's Office filed an Application for Direct Appellate Review with the assent of Kennametal, to the Massachusetts court. The Motion was allowed on April 17, 1997, and after oral argument, the court issued its decision affirming the decision of the board on October 29, 1997.

The Massachusetts court held that the board's Decision was supported by substantial evidence, and stated:

> There exists no bright line to distinguish those activities that are entirely ancillary to the solicitation of orders from those that also serve an independent function. Activities such as those cited by the board occur along a continuum. *Wrigley* guides our analysis merely with examples at each end of the continuum. In the end, business activities conducted within a state must be considered on an individual basis.

*Kennametal v. Commissioner of Revenue*, 426 Mass. 39, 45, 686 N.E.2d 436, 441 (1997).

The Massachusetts court further held that:

> The activities here in question were designed not only to solicit orders, but to ingratiate customers and to assist buyers in knowing what to order. Those activities fall outside of the protection afforded by Section 381(a)(1). Under *Wrigley*, the activities must facilitate the actual solicitation of orders; they may not merely serve to increase general sales.

*Kennametal*, 686 N.E.2d at 441 (1997).

Lastly, the Massachusetts court held that:

> Kennametal had reasons independent of soliciting orders that motivated it to provide the activities in question, even if no sales force operated in the Commonwealth. For example, proper use of

> Kennametal's products improves performance and enhances the company's reputation among buyers. This can be especially important for companies such as Kennametal that attempt to promote their products as being of higher quality than those of competitors.

*Id.*

## REASONS FOR GRANTING THE WRIT

### I. The decision of the Massachusetts court conflicts with a previous decision of this Court on an important federal issue.

The decision of the Massachusetts court conflicts with this Court's decision in *Wrigley* with respect to the following important federal question: what constitutes "solicitation" of orders of tangible personal property and "activities ancillary thereto" under Section 381(a)(1)?

In *Wrigley*, this Court articulated a precise set of rules governing the application and scope of Section 381(a)(1), and provided a detailed analysis of the types of sales activities which are protected under the federal statute. The Massachusetts court misapplied this analysis in reaching a decision that is contrary to the letter and the spirit of this Court's decision in *Wrigley*.

In 1959, Congress enacted Public Law 86-272 (codified at 15 U.S.C. § 381) in response to the concerns of the business

community that this Court had signaled[3] a conclusion that the individual states had extremely broad authority to impose corporate excise taxes on foreign corporations whose only contacts with a state consisted of sending salesmen into that state. *See* H.R. Rep. No. 936, 8th Cong., 1st Sess., 2 (1959). *See also Heublein, Inc. v. S. Carolina Tax Commission*, 409 U.S. 275, 280 n.5 (1972). This federal statutory provision expressly restricts the authority of a state to impose an income tax on a foreign corporation whose business within the state consists solely of "the *solicitation of orders* . . . for sales of tangible personal property, which orders are [then] sent outside the state for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the state." 15 U.S.C. § 381(a)(1) (emphasis added). More than thirty (30) years after the enactment of this provision, this Court in *Wrigley* set forth working definitions of the law's operative terms.

Specifically, this Court held that the phrase "solicitation of orders," as found in Section 381(a)(1), includes "more than what is strictly essential to making requests for purchases." *Wrigley*, 505 U.S. at 228 (1992). The phrase also includes those activities which are "entirely ancillary to requests for purchases." *Id.* This Court further explained

---

[3] The concerns of the business community stemmed from this Court's decision in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), and this Court's dismissal of an appeal in *Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La. 651, 101 So.2d 70 (1958), *appeal dism'd*, 359 U.S. 28 (1959) and this Court's denial of certiorari in *International Shoe Co. v. Fontenot*, 236 La. 279, 107 So.2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959).

that activities are "entirely ancillary to requests for purchases" if they "serve no independent business function apart from their connection to the soliciting of orders." *Id.* at 228-29.

On the other hand, activities are *not* entirely ancillary to requests for purchases if they are "activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force." *Id.* at 229. The determination of whether an activity is entirely ancillary to requests for purchases is made by considering the facts and circumstances of each case. *See id.* at 234-35.

Thus, under this Court's analysis, in considering the nature of non-direct solicitation activities (those activities which are not strictly essential to making requests for purchases), such activities will *not* be "ancillary to requests for purchases" only if the company would have reason to engage in such activities even if the company did not already have a direct sales force available in the state.

Importantly, in determining what Congress meant by the term "solicitation of orders" this Court rejected the recommendation by the State of Wisconsin that the term must be construed narrowly. *Id.* at 224. Rather, on the grounds that Section 381(a)(1) was intended by Congress specifically to restrict state taxing authority, this Court concluded that it could not be construed narrowly. *Id.*

Instead, this Court noted that Section 381(a)(1) uses the term "solicitation" in a general sense that includes not merely the ultimate act of inviting an order but the entire process associated with the invitation. *Id.* at 225. The Court also noted that Section 381(a)(1) describes "the solicitation of

orders" as a subcategory, not of in-state acts, but rather of in-state "business activities," a term that "more naturally connotes *courses of conduct*." *Id.* at 225-26

This Court stated:

> We think it evident that in this statute the term includes, not just explicit verbal requests for orders, *but also any speech or conduct that implicitly or explicitly invites an order*. Thus, for example, a salesman who extols the virtues of his company's product to the retailer of a competitive brand is engaged in "solicitation" even if he does not come right out and ask the retailer to buy some.

*Id.* at 223 (emphasis added).

This Court further noted that limiting Section 381(a)(1)'s phrase "solicitation of orders" only to those acts that are "'essential' for making requests [for purchases] would engender endless uncertainty, contrary to the whole purpose of the statute." *Id.* at 226. Accordingly, this Court drew the bright line between those activities "that are *entirely ancillary* to requests for purchases" and those activities that "the company would have reason to engage in anyway" but instead elects to allocate to its in-state sales force. *Id.* at 228-29 (emphasis added). Under this Court's clear test, a taxpayer may avail itself of Section 381(a)(1)'s protection by establishing that the activities engaged in by its salesmen "serve no independent business function apart from their connection to the soliciting of orders." *Id.* In applying this test to the actual facts in *Wrigley*, this Court stated:

> Providing a car and a stock of free samples to salesmen is part of the "solicitation of orders," because the only reason to do it is to facilitate requests for purchases. Contrariwise, employing salesmen to *repair or service* the company's products is not part of the "solicitation or orders," since there is a good reason to get that done whether or not the company has a sales force.

*Id.* at 229 (emphasis added).

As part of its analysis, this Court expressly rejected the argument that had been used by a number of state courts that post-sale activities could not be included within the phrase "solicitation of orders." *Id.* at 230. This Court stated:

> [T]he pre-sale/post-sale distinction is hopelessly unworkable. Even if one disregards the confusion that may exist concerning when a sale takes place . . . manufacturers and distributors ordinarily have ongoing relationships that involve continuous sales, making it often impossible to determine whether a particular incidental activity was related to the sale that preceded it or the sale that followed it.

*Id.* at 230-31 (citation omitted).

Applying this expanded definition of Section 381(a)(1)'s phrase "solicitation of orders" to the facts of *Wrigley*, this Court concluded that the replacement of stale

gum by the taxpayer's salesmen, the use of agency stock checks to provide gum, and the storage of gum in-state by company salesmen for these purposes constituted activities that had an "independent business function" and thus exceeded the "solicitation of orders." *Id.* at 233. Although acknowledging implicitly that each of these activities had a role in facilitating sales by establishing a positive relationship with the taxpayer's customers, the Court concluded that they would have had to have been performed by the taxpayer whether or not the company had a direct field sales force. *Id.* at 233-34. The other activities engaged in by the salesmen, consisting of in-state recruitment, training and evaluation of personnel and the use of hotels and homes for meetings were held by this Court to be ancillary to the "solicitation of orders". *Id.* at 234-35. Similarly, this Court concluded that the intervention by the taxpayer's regional sales manager on behalf of customers with respect to credit issues with Wrigley's headquarters was ancillary to the "solicitation of orders," stating that: "[i]t hardly appears likely that this mediating function . . . would have been performed by some other employee–some company ombudsman, so to speak–if the on-location sales staff did not exist." *Id.* at 235. In this regard, this Court specifically held that since the purpose of this particular activity was to "*ingratiate the salesman with the customer,*" it could be said that it appropriately facilitated the request for a purchase. *Id.* (emphasis added).

The Massachusetts court purported to follow this Court's standards as set forth in *Wrigley*. However, it is apparent from a close reading of the Massachusetts court's decision that the Massachusetts court, in effect, rejected the standards set forth in *Wrigley* for determining which activities

are immune from taxation under Section 381(a)(1) – in favor of its own more restrictive standards.

In the first instance, the Massachusetts court does not acknowledge the breadth of the rule of *Wrigley*. The Massachusetts court states:

> There exists no bright line to distinguish those activities that are entirely ancillary to the solicitation of orders from those that also serve an independent business function. Activities such as those cited by the board occur along a continuum. *Wrigley* guides our analysis merely with examples at each end of that continuum. In the end, business activities conducted within a state must be considered on an individual basis.

*Kennametal*, 686 N.E.2d at 441 (1997).

The Massachusetts court's assumption that immune and non-immune activities occur along a continuum suggests that marginal changes in the way a company does business may transform an otherwise immune activity into a non-immune activity – a standard that invariably will punish an aggressive sales force and reward complacency. The Massachusetts court's articulation is certainly not the test of *Wrigley*. This Court in describing the proper standard to be used stated:

> Once it is acknowledged, as we have concluded it must be, that "solicitation of orders" covers more than what is strictly essential to making

> requests for purchases, the next (and perhaps the only other) clear line is the one between those activities that are entirely ancillary to requests for purchases – those that serve no independent business function apart from their connection to the soliciting of orders – and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force.[4]

*Wrigley*, 505 U.S. at 228-29 (1992).

In applying its own standard, the Massachusetts court incorrectly concludes that:

> The activities here in question were designed not only to solicit orders, but to *ingratiate customers and to assist buyers in knowing what to order*. Those activities fall outside of the protection afforded by Pub. L. 86-272. Under *Wrigley*, the activities must facilitate the actual solicitation of orders; they may not merely serve to increase general sales.

---

[4] Rather than a gradual ascent into non-immune activities this Court's "independent business function" test is more like a cliff– once having stepped off, taxation is a given subject only to a *de minimis* safety net. As this Court has warned, except for the *de minimis* exception, Section 381 operates "in . . . stark, all-or-nothing fashion: A company either has complete net-income tax immunity or it has none at all, even for its solicitation activities." *Wrigley*, 505 U.S. at 231 (1992).

*Kennametal*, 686 N.E.2d at 441 (1997) (emphasis added).

The Massachusetts court's specific conclusion here is wrong for a number of reasons.[5] First, the Massachusetts court seemingly rejects *Wrigley's* "independent business function" test in favor of a "direct-indirect sales pitch" test. This Court informs us in *Wrigley* that indirect solicitation activities are protected as long as they serve no independent business function. Moreover, this Court has held that activities designed to "ingratiate the salesmen with the customer" may be protected. *Wrigley*, 505 U.S. at 235 (1992). In *Wrigley*, this Court in evaluating the activities of regional sales managers intervening in "rather nasty" credit disputes involving important accounts in order to "get the account and [Wrigley's] credit department communicating" stated:

> It hardly appears likely that the mediating function between a customer and a central office would have been performed by some other employee – some company ombudsman, so to speak – if the on-location sales staff did not exist. The purpose of the activity, in other words, *was to ingratiate the salesmen with the customer, thereby facilitating requests for purchases.*

---

[5] To the extent *Wrigley* can be read as failing to address the assumed category of activities outside the trilogy of activities encompassing (1) "solicitation", (2) "activities ancillary" thereto, or (3) having an "independent business function", such activities must be determined to be immune from taxation lest the purpose of Section 381 be frustrated.

*Id.* at 235. (emphasis added.)

Thus, contrary to the holding of the Massachusetts court, activities that are intended to ingratiate the sales force with customers in order to facilitate future requests for purchases are protected, as long as those activities do not have an independent business purpose – that is, if the company would not have reason to engage in such activities anyway if there was no in-state sales force.[6]

The Massachusetts court's statement that activities designed to "assist buyers in knowing what to order" exceed the protection afforded by Section 381(a)(1) is equally incorrect. It is hard to imagine any activity, other than an actual request for a purchase, that reflects the essence of solicitation more than assisting buyers in knowing what to order. As this Court has stated:

---

[6] The Massachusetts court would apparently limit the scope of "solicitation" to "asking" for, "enticing" to, or "to approach with a request or plea," *see Wrigley*, 505 U.S. at 223 (1992), contrary to this Court's admonition that the term in the context of Section 381(a)(1) includes not just explicit verbal requests for orders, but also any speech or conduct that implicitly invites an order. *Id.* The Massachusetts court would thus modify this Court's decision in *Wrigley* and return to the narrow construction of Section 381(a)(1) espoused by some states prior to the issuance of the *Wrigley* decision. *See generally Hervey v. AMF Beaird, Inc.*, 250 Ark. 147, 464 S.W.2d 557 (1971); *Clairol, Inc. v. Kingsley*, 109 N.J. Super. 22, 262 A.2d 213, aff'd, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dism'd*, 402 U.S. 902 (1971).

> That the statutory phrase uses the term "solicitation" in a more general sense that includes not merely the ultimate act of inviting an order but the entire process associated with the invitation is suggested by the fact that § 381 describes "the solicitation of orders" as a subcategory, not of in-state acts, but that of in-state 'business activities' – a term that more naturally connotes courses of conduct.

*Wrigley*, 505 U.S. at 225-26 (1992).

Clearly, activities designed to "assist buyers in knowing what to order," *Kennametal*, 686 N.E.2d at 441 (1997), are within the "courses of conduct," *Wrigley*, 505 U.S. at 226 (1992), constituting the entire process of inviting an order. Accordingly, the Massachusetts court's reasoning is contrary to the rule of *Wrigley*.

In addition, the Massachusetts court's conclusion that because "the proper use of Kennametal's products improves performance and enhances the company's reputation among buyers," *Kennametal*, 686 N.E.2d at 441 (1997), that assisting these same buyers in choosing the proper cutting bit to purchase for a particular application (out of literally thousands of Kennametal cutting bits) exceeds solicitation is likewise contrary to the spirit of *Wrigley*.[7] Clearly, it is in the

---

[7] This Court rejected the "routinely-associated-with-solicitation" or "customarily-performed-by-salesmen" approach proffered by the taxpayer in *Wrigley* on the basis that such an approach would

(continued...)

best interest of sales people to sell the proper item to customers, in order to ensure future orders. The purchase of the correct Kennametal cutting bit for a particular application ensures that a particular customer will be satisfied with the product, and will continue to order cutting bits from Kennametal. This is exactly the type of "ongoing relationship," that this Court recognizes as commonplace between manufacturers and distributors. *Wrigley*, 505 U.S. at

---

[7] (...continued)
convert a standard embracing only a particular activity ("solicitation") into a standard embracing all activities routinely conducted by those who engage in that particular activity ("salesmen"). *Wrigley*, 505 U.S. at 227 (1992). This Court warned that if such an approach were to be applied "on an industry-by-industry basis, it would render the limitation of §381(a) toothless, permitting 'solicitation of orders' to be whatever a particular industry wants its salesmen to do." *Id.* Importantly, however, this Court never stated that solicitation and acts ancillary thereto were identical from industry to industry. Rather, this Court set forth an evidentiary test (the "independent business function" test) to determine whether or not activities in a particular industry exceed permitted solicitation. It would be anomalous to require each industry to limit its solicitation activities to a universal course of conduct. Clearly what constitutes "solicitation" may vary greatly from industry to industry. However, so long as that solicitation activity serves no independent business function, it should be protected under *Wrigley*. Therefore, assisting customers in choosing a particular cutting bit from a product line of 20,000 cutting bits would seem to be completely ancillary to solicitation in Kennametal's industry, even though in another industry, say the chewing gum industry, it would be highly improbable that a customer would need the assistance of a salesperson to choose the correct flavor from a limited number of choices.

230-31 (1992). The Massachusetts rule would result in salespersons in a complex and technical industry frequently selling the wrong product for a particular purpose, thereby ensuring the customer's dissatisfaction and threatening an otherwise symbiotic relationship. This cannot be the correct result under *Wrigley*.

Lastly, the Massachusetts court would deny immunity from taxation for activities "primarily intended, generally, to increase sales rather than directly to facilitate the solicitation of orders." *Kennametal*, 686 N.E.2d at 442 (1997). Again, the Massachusetts rule is directly contrary to the rule of *Wrigley*. For instance, it has long been recognized that so-called "missionary" activities are protected – in situations where an in-state sales force directly targets retailers in order to create goodwill and a market for its products, the fact that it is a wholesaler that ultimately places the order and not the retailer, does not affect the immune nature of the solicitation activities. *Wrigley*, 505 U.S. at 233-34 (1992). Specifically, this Court has recognized that:

> Section 381(a)(2) shields the manufacturers "missionary" request that an indirect customer (such as a consumer) place an order, if a successful request would ultimately result in an order's being filled by a § 381 "customer" of the manufacturer, i.e., by the wholesaler who fills the orders of the retailer with goods shipped to the wholesaler from out of state.

*Id. See also Gillette Co. v. State Tax Comm'n*, 56 A.D.2d 475, 482, 393 N.Y.S.2d 186, 191 (1977) ("Advice to retailers on the art of displaying goods to the public can hardly be more

thoroughly solicitation. . ."). Thus, activities that are designed to "increase sales generally" are not necessarily non-immune. The proper test is not whether an activity facilitates sales generally, but rather, whether the activity either "facilitate[s] the *requesting of sales*," *Wrigley*, 505 U.S. at 233 (1992) (emphasis added), or has some other independent business function.

In the present case, the alleged non-immune activity – Kennametal's Massachusetts sales force helping Kennametal customers choose the right cutting bits to order – was specifically intended to "facilitate the requesting of sales" within the meaning of *Wrigley*. The same can be said of Kennametal's sales force's use of cutting bit samples to demonstrate the superiority of Kennametal products, Kennametal's standardization program designed to shift its customers' use of competitors' bits to Kennemetal's bits, Kennametal's in plant "training" presentations intended to introduce new products to be sold, and assisting dissatisfied Kennametal customers in choosing new cutting bits. Each of these activities were specifically intended by Kennametal to facilitate the requesting of sales, and served no other independent business purpose. *Wrigley*, 505 U.S. at 233 (1992).

## CONCLUSION

The decision of the Massachusetts court, in deciding an important federal question under the Commerce Clause of the United States Constitution, conflicts with this Court's decision in *Wrigley*, and will create confusion for other state and federal courts interpreting *Wrigley* in the future. The Petition for a Writ of Certiorari should be granted to bring clarity and uniformity to the law of "solicitation" and "activities ancillary thereto."

Respectfully submitted,

WILLIAM E. HALMKIN
(Counsel of Record)
ARTHUR A. HUNDHAUSEN
ROBERT M. FINKEL
Attorneys for Petitioner
Hutchins, Wheeler & Dittmar
A Professional Corporation
101 Federal Street
Boston, Massachusetts 02110
(617) 951-6600

January 26, 1998

# COMMONWEALTH OF MASSACHUSETTS

## APPELLATE TAX BOARD

## KENNAMETAL, INC.
## V.
## COMMISSIONER OF REVENUE

Docket Nos. 170029, 183527, 186703
Promulgated: November 1, 1996

These appeals under the formal procedure pursuant to G.L. c. 62C, § 39, as amended, from the refusal of the appellee to abate corporate excise taxes assessed under G.L. c. 63, § 38.

Commissioner Scharaffa heard the appeals and was joined in the decision for the appellee by Commissioners O'Brien and Wall.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13, as amended, and 831 CMR 1.32.

*William E.Halmkin*, Esq., and *Donald W. Parker*, Esq., for the appellant.

*Edward J. Liptak*, Esq., and *Philip S. Olsen*, Esq., for the appellee.

# FINDINGS OF FACT AND REPORT

## Introduction

On the basis of the parties' Agreed Statement of Facts, testimony, and exhibits, the Board made the following findings of fact.

Kennametal, Inc. ("Kennametal") is a multi-national corporation organized under the laws of Pennsylvania with a principal place of business at Route 981 South, Latrobe, Pennsylvania. Kennametal is engaged in the development, manufacture, marketing and application of cemented carbides, ceramics and other materials used in machining, cutting, shaping and forming of alloys, pure metals, coal, concrete and other substances.

On August 20, 1943, Kennametal registered with the Secretary of State's Office to do business in the Commonwealth of Massachusetts. From November 1, 1943 through March 31, 1960, Kennametal maintained a customer service center in Springfield, Massachusetts. Since April 1, 1960, Kennametal has not owned or rented office space within the Commonwealth.

As a foreign corporation, Kennametal filed Form 355B and paid the tax due as shown on its returns for each tax year from 1943 until 1963. On January 17, 1963, Kennametal filed Form 355F, Statement of Facts Relative to Business, seeking permission to discontinue filing Massachusetts foreign corporation excise returns.

On or about February 13, 1963, the Commissioner of Revenue ("Commissioner") responded to Kennametal's request and indicated that Kennametal was not subject to excise under Chapter 63 of the Massachusetts General Laws.

In March 1984, the Commissioner issued a Letter Ruling indicating that use of company cars within the Commonwealth was sufficient to establish nexus for purposes of imposing the corporate excise tax.

## Jurisdiction

Kennametal timely filed its corporate excise returns for tax periods beginning July 1, 1984 and ending August 30, 1989. Kennametal also timely filed, in response to the Commissioner's audit, all tax returns for tax periods beginning July 1, 1975, and ending August 30, 1984. Kennametal timely filed all Applications for Abatements, and Formal Petitions with the Board, for tax periods beginning July 1, 1975 and ending August 30, 1989. Based on the foregoing, the Board finds that it has jurisdiction over the subject appeals.

## Activities

The primary products sold by Kennametal are cutting bits which are mounted into various types of machine tools for the purpose of cutting and shaping a metal workpiece. In most machining operations, the metal workpiece which is to be cut is rotated at different angles against the stationary cutting tool. Metal cutting tools have short lives of anywhere from several minutes to a day. Choosing the proper cutting

tool for a particular application is essential to purchaser satisfaction and Kennametal's overall profitability.

Kennametal's business activities in Massachusetts for the years in question included sales to Massachusetts customers through a direct field sales force. Kennametal's sales force was comprised of Tooling Systems Engineers ("TSEs"), assisted by Service Engineers ("SEs") and Engineered Productivity Personnel ("EP"), all of whom either lived in or traveled to Massachusetts. The record is not clear as to exactly how many employees Kennametal had in Massachusetts in any one given year, but the record supports the conclusion, and the Board finds, that there were at least 4 TSEs and 7 SEs visiting hundreds of clients located within the Commonwealth at all relevant times.

The TSE's primary responsibility was management of the total sales and promotional efforts for the complete line of Kennametal metalworking products within a prescribed geographic area. Pursuant to Kennametal's field sales manual, SEs were entry level trainees whose primary responsibility was to assist the TSE in increasing and maximizing sales volume and customer satisfaction. SEs had no direct account responsibility, and did very little, if any order taking, but would travel with the TSE and perform what Kennametal has termed "sales-related" functions. The field personnel would visit existing and prospective customers on a regular basis.

Kennametal's products are highly sophisticated and technical. The products could not simply be installed and be expected to operate at peak efficiency without technical advice and assistance. As such, the TSE and SE would often perform the following functions, among others:

1) Coordinate and present "Training Programs"/In-Plant Presentations;
2) Provide samples of a particular tool so that customers could do test runs;
3) Coordinate a "Standardization Program," including inventory analysis and performance tests at customers' facilities;
4) Assist customers' engineering staff in custom-designing machine cutting tools;
5) Assist customers' in properly applying a cutting tool; and,
6) Report customers' complaints and/or unresolved problems.

Due to the highly technical nature of Kennametal products, Kennametal believed it was necessary to provide customers with detailed technical information so that they could assess the value of Kennametal products. In addition, many of Kennametal's customers changed markets on a regular basis, requiring a new approach to grades, tooling and machining processes.

Throughout the years in question, Kennametal's customers were under a great deal of pressure, due to foreign competition and inflation, to control their operating costs and improve productivity. Kennametal recognized the high cost of their products, in comparison to their competitors, and undertook a number of programs to demonstrate to their customers why their products were superior.

These programs were not only limited to new customers, but would also be performed on behalf of existing customers, in an attempt to maximize customer satisfaction and to potentially expand Kennametal's market share. For example, Kennametal had their field personnel conduct tooling-product-application studies, called "Tool Performance Reports," on behalf of their customers, to demonstrate to their customers the superiority of Kennametal products.

These studies involved the application of Kennametal products in actual work situations at a customer's plant. During the test-run, the TSE or SE would note the parameters of operation. Although the Kennametal employee in charge of the study would not actually run the machine, due to liability concerns, he or she would be present at the customer's plant to advise the operators on how to properly use the Kennametal products and what parameters should be applied.

As the product was in use, the SE would make recommendations to the customer's employees concerning, among other technical suggestions, different parameters to be used which could affect the machining process. Upon completion of the study, the results obtained from using a Kennametal product would be compared to those obtained in using a competitor's product. Results from one Kennametal product would also be compared to the results of another Kennametal product of a different grade. The ultimate goal of the study was "to determine the cost effectiveness of given machining operations" and to reduce a customer's overall machining costs.

Kennametal sought to have their customers place "blanket orders," which reflected a customer's estimated annual usage of a particular Kennametal product. Kennametal would set aside inventory to satisfy this "blanket order." During the course of the year, the customer would place "releases or individual purchases" so as to release the product from Kennametal's inventory to the customer. At times, after the "blanket order" had been placed, the Kennametal employee would conduct another tool performance report to demonstrate that there was in fact an economic justification for purchasing Kennametal products and that the customer was getting the results it anticipated. In the instances where the tool performance report indicated that the Kennametal product was not the better choice, the Kennametal employee would work with the customer's employee in suggesting different parameters so as to improve the output of the Kennametal product.

Another mechanism for convincing customers of the superiority of Kennametal products was the "Tool Standardization/Consultative Program." This program involved two phases. The first phase was referred to as the "survey." The survey required the TSE to gain access to the customer's "floor" and gather information about the customer's current inventory. In many cases, the customer did not have a complete compilation of its inventory, and thus the process could be very time consuming, lasting anywhere from a few hours to several days. The information obtained would then allow the TSE to determine exactly what competitor products the customer had, and to recommend different styles and sizes of Kennametal products. After analyzing all of this information, the TSE would make

specific recommendations of items which the customer could purchase from Kennametal.

The second phase of the "Tool Standardization/ Consultative Program" was called the "implementation." The implementation would begin after the customer determined that it would be cost effective to transfer to a complete line of Kennametal products. In this phase, the customer would place a "blanket order," locking into a set price for a particular tool or set of tooling products for a specific machine. The items would remain in Kennametal's Connecticut warehouse until the customer called them down for delivery. After the customer called down a small amount, either the TSE or the SE would observe a head-to-head demonstration of a Kennametal product and the competitor's product.

This demonstration would then allow the TSE or SE to complete a Tool Performance Report. This report was then used to show the purchaser that the Kennametal product did in fact out-perform the competitor's product. If, however, the tool did not measure up to the Tool Standardization Report, the SE and/or TSE would assist the machine operator by suggesting certain changes to the applications, allowing the Kennametal tool to perform at peak efficiency. To quote Keith Lamontagne, employed by Kennametal for 13 years, as both a TSE and an SE, "We certainly prefer the customer do that [work with the Kennametal employee] rather than risk losing that insert business to someone else."

Another program offered to Kennametal customers were "in-plant presentations." These presentations ranged

anywhere from two to six hours in duration, and attendance ranged from as low as eight people to as many as two hundred. Presentations were given to employees of potential as well as current customers. The subject matter of the sessions typically involved an overview of basic machining practices and techniques, as well as the proper use and application of Kennametal products. Kennametal strove to have each TSE conduct at least one such program per month.

Throughout their many visits to a customer's plant, Kennametal sales staff would often speak directly with the technical staff, in addition to the individual in charge of purchasing, allowing them to assess specific needs. Through these discussions the TSE would, at times, help a customer design a particular tooling system around the capabilities of Kennametal products. In addition, the sales force would often find themselves giving advice concerning set-up of a particular Kennametal product.

Lastly, field personnel were also responsible for responding to and resolving customer complaints. When a customer had a problem with a product it purchased from Kennametal, the TSE or the SE was there to correct it. Kennametal was well aware of the high cost of its product. As such, they acknowledged the importance of having a local representative who could quickly and efficiently respond to the problems and concerns of customers.

The activities performed by both the TSEs and the SEs were not limited to only potential customers. In many situations, the in-plant training programs, as well as providing technical advice and problem shooting, were provided to existing customers. Although Kennametal maintained that in

such cases, the sales force would be trying to increase sales and/or educate the customers about new products, its employees were also performing a function beyond mere "solicitation of orders." They were providing technical advice on the proper use of the product, and performing detailed studies of alternative products and procedures.

To the extent it is a finding of fact, the Board finds that the activities of Kennametal employees served an independent business function and were not entirely ancillary to the solicitation of orders. Although such technical advice and studies may help to increase purchases, they are not ancillary to requesting purchases since there is an independent business reason to provide advice on the proper use of its product regardless of whether Kennametal had a sales force. The fact that such activities were assigned to the sales force does not convert the activities into those entirely ancillary to solicitation. Accordingly, the Board issued a decision for the Commissioner of Revenue in these appeals.

## OPINION

Massachusetts General Laws requires "every foreign corporation . . . qualified to do business or actually doing business in the Commonwealth, or owning or using any part or all of its capital . . . in the Commonwealth . . ." to pay a corporate excise. G.L. c. 63, § 39. The appellant in the present appeals neither owned nor rented any real property situated within the Commonwealth for the taxable years in question. As such, the issue to be determined is whether or not Kennametal was "doing business in the Commonwealth" thereby subjecting it to Massachusetts corporate excise tax.

The right to tax is an inherent power of sovereignty that must be found within the letter of the law and may not be implied. *Commissioner of Corporations and Taxation v. Tousant*, 309 Mass. 84, 85 (1941). A foreign corporation entering a state subjects itself to the jurisdiction of that state including its local tax laws. *Norton Company v. Department of Revenue of Illinois*, 340 U.S. 534, 537 (1950).

This inherent power to tax, however, is not without limit. Congress has prohibited the states from imposing taxes on income derived from "business activities" in interstate commerce which are limited to the "solicitation of orders." 15 U.S.C. § 381. Section 381, also known as Public Law 86-272 provides, in pertinent part:

(a) No state, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only *business activities* within such State by or on behalf of such person during such taxable year are either, or both of the following: (emphasis added)

1) the *solicitation of orders* by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside this State; and

2) the *solicitation of orders* by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if

> orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

15 U.S.C. § 381 (1988) (codifying § 101 of Pub. L. 86-273 [73 Stat. 555 (1959)]).

In 1994, the Massachusetts Supreme Judicial Court ruled that the mere "qualification to do business" was not enough to remove a corporation from the immunities of § 381. *Commissioner of Revenue v. The Kelly-Springfield Tire Company,* 419 Mass. 262 (1994). The Court did not entertain the issues presented in this appeal of what activities are encompassed within the term "solicitation of orders" and when has a corporation's activities exceeded those protected by § 381.

While § 381 was designed to define a lower limit for the exercise of a state's power to tax (*Heublein, Inc.*, 409 U.S. 277, 280 (1972)), the statute does not define what is encompassed within "solicitation of orders." As a result, states have been left to determine, on a case-by-case basis, whether the activities of a particular corporation exceed "solicitation of sales." As might be expected, there has been a split between those states which have interpreted "solicitation of orders" narrowly and those which have allowed an expanded interpretation.

In 1970, the New Jersey Superior Court decided the case of *Clairol, Inc. v. Kingsley,* 109 N.J. Super 22; 262 A.2d 213 (1970). In that case, the court observed that Clairol employed "detailmen and other representatives" to visit retail drugstores "to promote the public's purchase and use of its

products." *Id.* at 29. As part of their duties, the detailmen would occasionally review the display of Clairol products and assist the retailer in rearranging the display. In addition, with the retailer's permission, the detailman would take an inventory of the store's stock of Clairol products, would discuss the inventory with the retailer, and from there would write up a suggested order.

Besides the detailmen, Clairol also employed representatives who called on beauty salons. Like Kennametal's SEs, the representatives who called on the beauty salons had a technical background and would do very little order taking. A major part of their function was going into the local beauty salons to instruct the staff on how to use Clairol products. The Court rejected Clairol's argument that the term "solicitation of orders" should be interpreted to include all of their activities within the state. Even though the Court acknowledged that the activities of Clairol's representatives would promote purchase of Clairol products:

> That increased public favor of Clairol's products will eventually result in increased orders from retail druggists to wholesalers and from wholesalers to Clairol, or as in the case of its hair products from beauty salons to "beauty jobbers" and from the latter to Clairol, does not blanket all Clairol's activities with the protection afforded by the federal act to cases where the only business activity of the taxpayer is the solicitation of orders.

*Id.* The Court concluded that the activities of Clairol exceeded the "solicitation of orders" and therefore they were exempt from the immunities of § 381. Application of the

analysis used by the Clairol Court would result in a ruling in this appeal that the activities of Kennametal field personnel, primarily the providing of technical assistance and guidance as to how to use a particular product, went beyond "solicitation of orders."

The Oregon Supreme Court had the opportunity to address "solicitation of orders" in *Miles Laboratories, Inc. v. Department of Revenue*, 274 Or. 395, 546 P.2d 1081 (1976). The issue in *Miles Laboratories,* was whether or not Miles Laboratories had sufficient activities in Washington to subject them to taxation in that state. The plaintiff marketed proprietary medicines, nutritional and hygienic products and pharmaceuticals through distribution warehouses.

The company employed salesmen in the state of Washington. Each salesman maintained a stock of samples sufficient for a calendar quarter. These samples would be used for "account presentations," "samples for account personnel," "exchanging damaged merchandise," and "personal family samples." The Court concluded that the salesmen's activity of replacing damaged merchandise exceeded "solicitation" thereby giving Washington the power and jurisdiction to tax Miles Laboratories. *Id.* at 397, 546 P.2d at 1082.

In its decision, the Miles Laboratories Court adopted the reasoning of the Tax Court in *Olympia Brewing v. Dept. of Rev.*, 266 Or. 309, 511 P.2d 837 (1973), *cert. denied, 415* U.S. 976, 94 S.Ct. 1561 (1974), that:

> " ... 'solicitation' should be limited to those generally accepted or customary acts in the industry which lead

> to the placing of orders, not those which follow as a natural result of the transaction, such as collections, servicing complaints, *technical assistance and training...*"

*Miles* at 399, 546 P.2d at 1082 (emphasis supplied). Since much of the activities of Kennametal's TSEs and SEs involved technical assistance and training, the *Miles Laboratories* and *Olympia Brewing* decisions also suggest that Kennametal's activities exceed mere solicitation.

In *National Tires, Inc. v. Lindley*, 68 Ohio App.2d 71, 426 N.E.2d 793 (1980), appellant's business activities in Ohio "involved 'something more than solicitation.'" *Id.* at 79. National Tires sold "Modac" brand automotive parts to NAPA distribution centers in Ohio, through two levels: a zone manager and district managers. The district manager's function was to "call upon and give service to distribution centers, "jobbers," and "dealers." *Id.* at 74. The district and zone managers constantly checked inventory levels and records, removed old, defective products and ensured proper credit for them, replaced worn packaging, advised retailers on methods to improve their inventory, and checked to "see if there [were] any particular problems [he or she] can handle right now." *Id.* 74-75. In short, the court ruled that "[a]ppellant's zone and district managers performed functions more commonly related to maintaining an on-going business operation." *Id.* at 78-79.

Through their Standardization Program, Kennametal field personnel helped the purchaser, in some instances, by creating an inventory of products or bringing an existing inventory up to date. This information would then be used

to suggest potential items for purchase. As stated by Kennametal employees, this program was primarily designed to justify the high cost of Kennametal products and prove the cost effectiveness of switching to a full line of Kennametal products. Similar to the facts in *National Tires*, Kennametal's personnel were "maintaining an on-going business operation," venturing into business decisions with which a salesman would not normally be involved.

At the opposite end of the spectrum are the cases which apply a broad interpretation of "solicitation of orders" so as to include more activities within the protection offered by § 381. In *Gillette Company v. State Tax Commission*, 56 A.D.2d 475, 393 N.Y.S.2d 186 (3d Dep't 1977) *aff'd* 45 N.Y.2d 846 (1978), the New York Court of Appeals concluded that advising on display techniques did not go beyond those activities protected by § 381. *Id.* at 191. The Court concluded that where, "the taxpayer owns no real or personal property ... in the State and *makes no repairs on its goods after sales*, the purpose of P.L. 86-272 would be frustrated by permitting the tax." *Id.* (emphasis added).

*Gillette*, however, can be distinguished from the present appeal. Although Kennametal did not make physical repairs after the sale, by providing technical assistance as to the proper application of the product after the sale, and completing tool performance reports and tool standardization programs in which Kennametal employees suggested operational and/or product changes, Kennametal's activities are akin to post-sale "repairs."

In *Indiana Dept. of Revenue v. Kimberly-Clark Corp.*, 375 N.E.2d 1146 (Ind. Ct. App. 1978) *(Kimberly-Clark 1)*,

salesmen operating in Indiana would discuss with their direct customers ways to increase sales of the Kimberly Clark products. Occasionally, the salesmen called on indirect customers and did "missionary work" which included checking inventories, checking shelf facings and explaining products.

The Indiana Appeals Court agreed with the Supreme Court of Oregon that "'solicitation' must be limited to the acts which lead to the placing of an order." *Kimberly-Clark I* at 1149. The court concluded that checking customer inventories, pricing products and stocking shelves, and erecting displays may "reasonably be regarded as activities leading to the placing of orders..." *Id.* at 1150. However, the court concluded that conveying information to customers concerning out-of-stock conditions or delays in shipments, verifying destruction of damaged merchandise, and coordinating delivery of merchandise for special promotions could not be classified as "solicitation." *Id.*

On further appeal, the Indiana Supreme Court concluded that Kimberly-Clark's activities did not exceed those protected by § 381. *Indiana Department of Revenue v. Kimberly-Clark Corporation*, 416 N.E.2d 1264. The Indiana Supreme Court focused on those functions which the Appeals Court deemed not to be solicitation. In their decision, the court concluded that "Congress perceived 'solicitation' as embodying 'sundry activities so long as those activities [are] closely related to the eventual sale of a product.'" *Id.* at 1268.

It was not until 1992 that the United States Supreme Court decided the case of *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 112 S.Ct. 2447 (1992). Wrigley was

the Court's first statement as to what was encompassed by the term "solicitation of orders," and thus provided the first guidance as to what activities were protected under § 381.

The Wrigley Court concluded that the term "solicitation of sales" should not be construed as narrowly as suggested by *Clairol*, *Miles Laboratories*, and *National Tires*, so that only "actual requests for purchases or, at most, the actions absolutely essential to making those requests" were protected. *Wrigley* at 2455. The Court ruled that limiting the protected activities to the "actual request for purchases would reduce § 381 to a nullity" and limiting it to acts "essential for making requests would engender endless uncertainty." *Id.* at 2455.

The Court also, however, declined to broadly interpret, as suggested in *Gillette* and *Kimberly-Clark*, the term "solicitation of sales," rejecting the "'routinely-associated-with-solicitation' or 'customarily-performed-by-salesmen' approach." *Id.* Such an interpretation would render the limitations of § 381 "toothless." *Id.* at 2456.

In describing the proper standard to be applied, the Court also rejected the pre-sale/post-sale distinction. *Id.* at 2457. Acknowledging that "solicitation of orders" entails more than what is strictly *essential* to the requesting of purchases, the Court concluded that the next clear line must be drawn between "those activities that are entirely ancillary to requests for purchases - those that serve no independent business function apart from their connection to the soliciting of orders - and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force." *Id.* at 2456 (emphasis added) *citing National*

*Tires, Inc. v. Lindley*, 68 Ohio App.2d 71, 78-79, 22 Ohio Op. 3d 69, 73-74, 426 N.E.2d 793, 798 (1980) (company's activities went beyond solicitation to "functions more commonly related to maintaining an on-going business").

The Court in *Wrigley* specifically stated that employing salesmen to repair or service the company's products is not part of the "solicitation of orders." "Repair and servicing may help to increase purchases; but it is not ancillary to *requesting purchases*, and cannot be converted into *'solicitation' by merely being assigned to salesmen.*" *Wrigley* at 2457 (emphasis added). This was the only particular activity which the Court stated would remove a company from the immunity provided by § 381.

In its analysis, however, the Court cited the *Clairol* case. Although the Court noted that it did not agree with the New Jersey Court's application of a narrow interpretation of "solicitation of orders," the Court did agree with the ultimate decision based on the facts of the case. The Court reasoned that even applying a broad interpretation of "solicitation," "sending non-sales representatives to provide customers technical assistance in the use of Clairol products" would have resulted in the same judgment. *Wrigley* at 186, n.2.

In the present appeals, Kennametal's employees typically offered technical assistance to the customer's machinists both on an individual basis and through group presentations. Due to the highly technical nature of the Kennametal products, TSEs customarily offered "in-plant training programs." The subject matter of the sessions typically concerned the proper use and application of Kennametal products, as well as an overview of basic

machining practices and techniques. TSEs would also speak directly with the customer's employees to discuss problems with a particular product.

More in line with *Clairol* is the fact that SEs who admittedly had "no direct sales accounts" quite regularly, as part of their functions, offered technical assistance to a customer's employees as to the proper application and usage of Kennametal's products.

In conclusion, the Board ruled that Kennametal's activities within the Commonwealth, including inventory analysis and recommendations, product application studies; performance testing, providing technical assistance and guidance, and conducting in-plant training programs, exceeded "solicitation of orders." The Board also ruled that these activities, when taken as a whole, were not *de minimis*. Although Kennametal's activities may have had the effect of helping to enhance future sales and ultimately increase its market share, they were not *entirely ancillary* to the solicitation of orders. The activities obviously ingratiated the salesmen, but quite clearly had an "independent business function."

Kennametal urges, in the alternative, that even if any one particular function exceeds "solicitation of orders," there is a *de minimis* standard adopted in *Wrigley*. Although this may be accurate, the Court in *Wrigley* states that the proper inquiry is to look at the sum of all activities and not at individual activities in isolation.

The TSEs aimed to perform at least one in-plant training program per month. When conducting a

Standardization Program, the SE or TSE would be occupied anywhere from several hours to several days for one particular customer. Kennametal had many hundreds of clients situated within the Commonwealth. All of these customers had TSEs and SEs who visited them on a regular and frequent visit. During any one of these visits, the field personnel would offer technical assistance.

On this basis, the Board concludes that, taken as a whole, Kennametal's activities exceed any which would be allowed applying a *de minimis* standard.

Kennametal also suggests that the sales factor, used in determining Massachusetts taxable income, was miscalculated by the Commissioner. The party seeking an abatement generally has the burden of proof. *State Tax Comm'n. v. Hohn H. Breck, Inc.* 336 Mass. 277, 289 (1957); *A. W. Chesteron Company v. Commissioner of Rev.*, 37 Mass. App. Ct. 936 (1994); *Blakely v. Commissioner of Rev.*, 28 Mass. App. Ct. 499, 501 (1990). Thus, Kennametal bore the burden of proving that sales from the Canadian branch were inappropriately excluded from the denominator of the sales factor. Kennametal offered no evidence at trial on this point, nor did it offer more than a passing remark in any of its numerous briefs.

Based on the foregoing this Board concludes that Kennametal's activities within the Commonwealth exceeded the "solicitation of orders" protected by 15 U.S.C. § 381, and therefore was subject to the Massachusetts corporate excise tax for the years in question. In addition, Kennametal has failed to meet its burden of proof regarding the

Commissioner's determination of Massachusetts taxable income.

The decision for the appellee was promulgated on November 8, 1995.

APPELLATE TAX BOARD

/s/ Kenneth W. Gurge, Chairman

SJC-07448

KENNAMETAL, INC. *vs.* COMMISSIONER OF REVENUE.

Suffolk. September 5, 1997. - October 29, 1997.

Present: Wilkins, C.J., Abrams, Lynch, Greaney, Fried, Marshall, & Ireland, JJ.

*Taxation*, Corporate excise, Excise, Corporation. *Administrative Law*, Substantial evidence.

*Appeal* from a decision of the Appellate Tax Board.

The Supreme Judicial Court granted an application for direct appellate review.

*William E. Halmkin* (*Donald W. Parker* with him) for the plaintiff.

*Thomas A. Barnico*, Assistant Attorney General, for the defendant.

IRELAND, J. We granted an application from the Commissioner of Revenue (commissioner) for direct appellate review on this appeal by Kennametal, Inc. (Kennametal),

from a decision of the Appellate Tax Board (board). The board ruled that Kennametal, a Pennsylvania corporation, conducted activities within the Commonwealth between 1979 and 1989 that exceeded those protected by Pub. L. 86-272, codified at 15 U.S.C. § 381 (1994), thus subjecting Kennametal for those years to the Massachusetts excise on foreign corporations provided in G.L. c. 63, § 39. We affirm the board's decision.

1. *Background.*

Kennametal is a multinational corporation, organized under the laws of Pennsylvania and headquartered in that Commonwealth. Kennametal is engaged in the development, manufacture, and sale of cutting bits[1] and related products for the machining of metals, alloys, and plastics. The total product line consists of approximately 20,000 types of cutting bits and accessories.

Kennametal has been registered to do business in Massachusetts since 1943. During the ten-year period in question, from 1979 to 1989, Kennametal conducted business

---

[1] Cutting bits are small pieces of tungsten carbide. The bit is inserted into a tool holder which is then inserted into a larger machine tool. In most machining operations, the piece to be cut or shaped is rotated at different angles and at high speeds against the stationary cutting bit. The life of the cutting bit depends on such factors as the type of material and speed of rotation of the piece being machined, the angle of the cut, the shape of the cutting bit, and the age and condition of the machine tool itself. The cutting bit's life typically ranges from a few minutes to no more than a day.

in Massachusetts through the use of a direct field sales force. The sales force consisted primarily of tooling systems engineers (TSEs) and service engineers (SEs). TSEs were experienced personnel responsible for maintaining customer accounts. TSEs regularly visited current and prospective customers to solicit orders, conduct presentations, and give technical advice. SEs were less experienced personnel who did not have responsibility for customer accounts and whose primary function was to assist the TSEs. During the period in question, Kennametal held no property in Massachusetts other than its sales catalogs, automobiles that it leased for use by its sales force, and samples of cutting bits which the sales force used in connection with customer visits.

Kennametal paid the Massachusetts corporate excise for the tax years 1943 through 1963. In 1963, the commissioner ruled that Kennametal's activities in the Commonwealth at that time did not subject it to the corporate excise. Accordingly, Kennametal ceased filing corporate excise returns in Massachusetts.

In March, 1984, the commissioner issued a letter ruling holding that the use of company cars within the Commonwealth by employees of a foreign corporation constituted a level of business activity sufficient to subject the corporation to the Massachusetts excise.[2] Consequently, Kennametal resumed filing Massachusetts corporate excise returns for the 1985 tax year and timely filed corporate excise returns thereafter for each tax year over the remainder of the

---

[2] *See* LR 84-1, revoked by LR 88-7, 3 Mass Tax Guide at 567, 615 (West 1997).

period in question. In 1987, the commissioner commenced an audit of Kennametal that resulted in the assessment of additional taxes and penalties for the tax years 1976 through 1984. Kennametal timely filed requests for abatement for all relevant tax years. The commissioner abated penalties for the tax years 1976 through 1985, but denied the remainder of the abatement requests. Kennametal appealed to the board, which affirmed the commissioner's determination.

2. *Discussion.*

General Laws c. 63, § 39, imposes an excise on "every foreign corporation . . . actually doing business in the commonwealth . . . in a corporate form." The Commonwealth's broad taxing authority over foreign corporations, however, is limited by the Federal government's plenary power to regulate interstate commerce pursuant to the commerce clause of the United States Constitution. Acting under its constitutional powers, Congress in 1959 enacted Pub. L. 86-272, which expressly restricts the authority of a State to impose an income tax on foreign corporations whose business within the State consists solely of "the solicitation of orders . . . for sales of tangible personal property, which orders are [then] sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State."

Public Law 86-272 does not define "solicitation of orders." A number of State courts have attempted to define

this term more precisely.[3] However, there was no Federal case law dealing directly with this definition prior to 1992.[4] In that year, the United States Supreme Court in *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992) (*Wrigley*), concluded that solicitation of orders "covers more than what is strictly *essential* to making requests for purchases" (emphasis in original) *Id.* at 228. As such, some activities within the State involve something more than a direct request for purchase but, nevertheless, are still protected from State taxation under Pub. L. 86-272.[5]

---

[3] See, e.g., *Hervey v. AMMMF Beaird, Inc.*, 250 Ark. 1971); *Coors Porcelain Co. v. State*, 183 Colo. 325 (1973), *cert. denied*, 419 U.S. 874 (1974); *Indiana Dep't of Revenue v. Kimberly-Clark Corp.*, 275 Ind. 378 (1981); *Indiana Dep't of State Revenue v. Continental Steel Corp.*, 399 N.E.2d 754 (Ind. Ct. App. 1980); *Clairol, Inc. v. Kingsley*, 109 N.J. Super. 22 *aff'd*, 57 N.J. 199 (1970), *appeal dismissed*, 402 U.S. 902 (1971); *Gillette Co. v. State Tax Comm'n*, 56 A.D.2d 475 (N.Y. 1977); *aff'd*, 45 N.Y.2d 846 (1978); *National Tires, Inc. v. Lindley*, 68 Ohio App. 2d 71 (1980); *Miles Lab., Inc. v. Department of Revenue*, 274 Or. 395 (1976); *Iron Fireman Mfg. Co. v. State Tax Comm'r*, 251 Or. 227 (1968).

[4] In *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 278-282 (1972), the United States Supreme Court reviewed the history of Pub. L. 86-272. However, the Court stated that it did not need to decide "whether . . . the actions of Heublein's representative . . . [fell] within the term 'solicitation'" and thus did not define the term. *Id.* at 278.

[5] *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231-232 (1992), also held that Pub. L. 86-272 could protect an activity from State taxation if the activity qualified under a *de*

(continued...)

However, *Wrigley* drew a "clear line . . . between those activities that are entirely ancillary to requests for purchases – those that serve no independent business function apart from their connection to the solicitating of orders – and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force" (emphasis in original). *Id.* at 228-229. Hence, the solicitation of orders may include the provision of an automobile and a stock of free samples to a salesman, as these activities serve no purpose other than "to facilitate requests for purchases." *Id.* at 229. By contrast, the Court stated that:

> "employing salesmen to repair or service the company's products is not part of the 'solicitation of orders,' since there is good reason to get that done whether or not the company has a sales force. Repair and servicing may help to increase purchases; but it is not ancillary to *requesting purchases*, and cannot be converted into 'solicitation' by merely being assigned to salesmen" (emphasis in original). *Id.*

---

[5] (...continued)
*minimis* exception. To qualify for a *de minimis* exception, a court must consider the activities of the taxpayer within the State as a whole. *Id.* In *Wrigley*, the taxpayer's sales force made direct sales to customers amounting to 0.00007% of the taxpayer's total sales within the State. The Court stated that this activity exceeded the permissible scope of solicitation of orders and also did not qualify for the *de minimis* exception because of the sales force's other activities within the State. *Id.* at 235. Kennametal does not argue here that its activities qualify under the *de minimis* exception.

The *Wrigley* Court expressly rejected as overly broad the taxpayer's argument that "solicitation of orders" included any activities "routinely-associated-with" or "customarily-performed-by salesmen." *Id.* at 227.

Kennametal does not dispute that it "actually [does] business in the commonwealth" as set out in G.L. c. 63, § 39. Kennametal also does not dispute the dollar amount that is due if any amount is due at all. Rather, Kennametal claims that its activities within the Commonwealth during the tax years in question consisted solely of the solicitation of orders as described in Pub. L. 86-272, and that it is therefore not subject to the Massachusetts corporate excise at all.

A decision of the board will not be reversed or modified if it is based on a correct application of the law and if it is based on substantial evidence. *See Koch v. Commissioner of Revenue*, 416 Mass. 540, 555 (1993); *Commissioner of Revenue v. Wells Yachts South, Inc.*, 406 Mass. 661, 663 (1990) ; *Tenneco Inc. v. Commissioner of Revenue*, 401 Mass. 380, 383 (1987). The board's decision is final as to findings of fact.[6] G.L. c. 58A, § 13. But the court may consider whether the evidence in the case is sufficient to support the board's conclusion of law. *Assessors of Weymouth v. Curtis*, 375 Mass. 493, 499 (1978); *Boston Edison Co. v. Selectmen of Concord*, 355 Mass. 79, 92 (1968). Our review of the sufficiency of evidence, however, is limited to "whether

---

[6] "The credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters for the board." *Cummington School of the Arts, Inc. v. Assessors of Cummington*, 373 Mass. 597, 605 (1977).

a contrary conclusion is not merely a possible but a necessary inference from the findings." *Commissioner of Revenue v. Houghton Mifflin Co.*, 423 Mass. 42, 43 (1996), quoting *First Data Corp. v. State Tax Comm'n*, 371 Mass. 444, 446 (1976).

We conclude first that the Board applied the correct legal standard. The board stated that:

> "the activities of Kennametal employees served an independent business function and were not entirely ancillary to the solicitation of orders. Although such [activities] may help to increase purchases, they are not ancillary to requesting purchases since there is an independent business reason to provide advice on the proper use of its product regardless of whether Kennametal had a sales force. The fact that such activities were assigned to the sales force does not convert the activities into those entirely ancillary to solicitation."

The board's exposition of the legal standard it used in reaching its decision comes directly from *Wrigley, supra* at 228-229, almost to the extent of direct quotation.

Kennametal's argument here focuses on what it refers to as the board's "reliance" on *Clairol, Inc. v. Kingsley*, 109 N.J. Super. 22, aff'd, 57 N.J. 199 (1970), appeal dismissed, 402 U.S. 902 (1971), decided twenty-one years before the *Wrigley* case. In *Clairol*, the court held that the taxpayer's activities within the State exceeded those protected by Pub. L. 86-272, thus subjecting the taxpayer to the state's corporate income tax. *Id.* at 30. The *Wrigley* Court, supra at 224-226, expressly rejected the analysis used in *Clairol*. However, the Court

concluded that the result in Clairol would remain unchanged even under the Wrigley analysis. *Id.* at 224 n.2. Here, the board used the *Clairol* result as one of a series of cases it analyzed to determine the permissible scope of "solicitation of orders." Nowhere does the board's reference to *Clairol* implicate a standard of legal review. Accordingly, the board's use of *Clairol* is appropriate, and Kennametal's argument that the Board relied on Clairol as an incorrect legal standard is without merit.[7] The board's decision is also supported by

---

[7] Kennametal also argues that the legal standard for determining the scope of permissible activities was determined by the Appeals Court in *A. W. Chesterton Co. v. Commissioner of Revenue*, 37 Mass. App. Ct. 936 (1994). In *Chesterton*, the board determined that the out-of-State activities of the sales force of a domestic corporation (Chesterton) were entirely ancillary to the solicitation of orders and thus fell under the protection of Pub. L. 86-272 in the foreign States. The Appeals Court affirmed the Board. The Appeals Court stated that the out-of-State activities of the sales force included "handling consumer complaints and providing consumer and distributor training in the field." *Id.* at 938. Kennametal cites this language as standing for the proposition that the Appeals Court determined that such activities were within the permissible scope of solicitation of orders. However, the case is inapposite. The issue in this part of the Appeals Court's decision did not concern the standard for solicitation of orders, but rather the burden of proof. The Appeals Court simply held that Chesterton had not met its burden of proving that the activities of the sales force did in fact exceed the permissible scope of solicitation of orders because Chesterton's proof was "suggested only vaguely by the evidence it presented." *Id.* As such, the Appeals Court did not rule on the

(continued...)

substantial evidence. The Administrative Procedure Act defines "[s]ubstantial evidence" as "such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30A, § 1 (6). According to the board, a number of Kennametal's activities within the Commonwealth exceeded the permissible scope of the solicitation of orders under Pub. L. 86-272. Those activities included (1) using samples for testing the performance of Kennametal's products and preparing reports based on the test results, (2) preparing inventory analyses as part of a broader tool standardization program,[8] and (3) making frequent in-plant presentations (up to six hours in length and involving as many as 200 employees of current and prospective customers) on the use of Kennametal's products.

There exists no bright line to distinguish those activities that are entirely ancillary to the solicitation of orders from those that also serve an independent business function. *See Wrigley*, *supra* at 228-29. Activities such as those cited by the board occur along a continuum. *Wrigley* guides our analysis merely with examples at each end of that continuum. In the end, business activities conducted within a State must be considered on an individual basis.

---

[7] (...continued)
merits of the permissible scope of solicitation of orders and Kennametal's reading of *Chesterton* is incorrect.

[8] The tool standardization program involved surveying every machine at a customer's plant and preparing an analysis of how Kennametal's products could be used exclusively for each machine. The surveys lasted from a few hours to several days.

The activities here in question were designed not only to solicit orders, but to ingratiate customers and to assist buyers in knowing what to order. Those activities fall outside of the protection afforded by Pub. L. 86-272. Under *Wrigley*, the activities must facilitate the actual solicitation of orders; they may not merely serve to increase general sales. *Id.* at 233.

Kennametal had reasons independent of soliciting orders that motivated it to provide the activities in question, even if no sales force operated in the Commonwealth. For example, the proper use of Kennametal's products improves performance and enhances the company's reputation among buyers. This can be especially important for companies such as Kennametal that attempt to promote their products as being of higher quality than those of competitors. Similarly, such activities on the part of Kennametal's sales force could relieve Kennametal from having to produce lengthy and detailed product manuals for customers. In short, the activities in question cannot be viewed as entirely ancillary to requests for purchase, but rather as serving an independent business function as well.[9]

---

[9] The Board also determined that Kennametal exceeded the permissible scope of the solicitation of orders under Pub. L. 86-272 with respect to resolving customer complaints. *Wrigley*, *supra* at 234-235, held that the resolution of customer complaints was entirely ancillary to the solicitation of orders and thus protected by Pub. L. 86-272. The case at hand is distinguishable. In *Wrigley*, the customer complaints in question involved credit disputes with the main office. The activities of the in-State sales force primarily involved acting as an intermediary between customers and the main

(continued...)

As such, Kennametal is not protected under Pub. L. 86-272.

Kennametal's own interpretation of its activities as merely part of an order solicitation process stretches Pub. L. 86-272 too far. Indeed, it is difficult to imagine where Kennametal's interpretation draws the line on impermissible activities. The *Wrigley* Court, *supra* at 226, explicitly noted that broad, open-ended interpretations of Pub. L. 86-272 would reduce that law to a nullity.

---

[9] (...continued)
office; the actual resolution of the problem did not come from the sales force itself. (Such disputes arose only two to three times a year within the entire State. *Id.* at 217). As such, the Court concluded that the mediation activities were entirely ancillary to the solicitation of orders because it was unlikely "that this mediating function . . . would have been performed by some other employee . . . if the on-location sales staff did not exist." *Id.* at 235. By contrast, Kennametal's customer disputes primarily involved problems with the use of the product itself. Kennametal's sales force typically called or visited the customer to resolve the problems directly. Also, these disputes arose far more frequently than the credit disputes in Wrigley. One Kennametal salesperson testified to having encountered approximately eighteen such incidents within the previous year among his customers alone. It thus appears highly likely that some employee would have performed the dispute resolution function in the absence of an in-State sales force. As such, the activity cannot be considered as entirely ancillary to the solicitation of orders; it simply represents the transfer of an impermissible activity to the sales force. As noted in *Wrigley*, such a transfer does not make the impermissible activity permissible. *Id.* at 229.

The board reasonably could conclude as it did that presentations in front of 200 employees were primarily intended, generally, to increase sales rather than directly to facilitate the solicitation of orders. Similarly, the board could reasonably conclude that lengthy surveys of all the machines in a particular customer's plant were intended primarily to increase over-all sales rather than merely to solicit orders. The board might have reached contrary conclusions, but such conclusions are not necessarily inferred from the facts. *See Commissioner of Revenue v. Houghton Mifflin Co.*, 423 Mass. 42, 43 (1996).

Finally, Kennametal warns of the potential chilling effect of the board's conclusion on companies like Kennametal whose products (or the applications of those products) are technically oriented. Kennametal maintains that the board's decision would prevent any foreign company with an in-State sales force from communicating to customers even the slightest technical information through its sales force, lest the Massachusetts corporate excise apply. Nothing in this opinion creates such a Draconian standard. Consistent with *Wrigley*, supra at 229, the standard merely prevents tax-generating activities from ceasing to be tax-generating simply because they are performed by an in-state sales force.

The board's decision is affirmed.

*so ordered.*

# 15 U.S.C. § 381 (1994)
# (PUBLIC LAW 86-272)

## § 381. Imposition of net income tax

### (a) Minimum standards

No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) **Domestic corporations; persons domiciled in or residents of a State**

The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to -

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) **Sales or solicitation of orders for sales by independent contractors**

For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) **Definitions**

For purposes of this section -

(1) the term "independent contractor" means a commission agent, broker, or other

independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

## MASSACHUSETTS GENERAL LAWS, CHAPTER 63, SECTION 39

**63:39. Foreign corporations; tax rate.**

Section 39. Except as otherwise provided herein, every foreign corporation, exercising its charter, or qualified to do business or actually doing business or actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth, shall pay, on account of each taxable year, the excise provided in subsection (a) or (b) of this section, whichever is greater.

The excise levied herein is due and payable on any one or all of the following alternative incidents:

(1) The qualification to carry on or do business in this state or the actual doing of business within the commonwealth in a corporate form. The term "doing business" as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in the commonwealth, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property.

(2) The exercising of a corporation's charter or the continuance of its charter within the commonwealth.

(3) The owning or using any part or all of its capital, plant or other property in the commonwealth in a corporate capacity.

It is the purpose of this section to require the payment of this excise to the commonwealth by foreign corporations for the enjoyment under the protection of the laws of the commonwealth, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation.

In the case of a corporation whose taxable year is a period of less than twelve calendar months, the portion of the amount determined under clause (1) of subsection (a) shall be multiplied by a fraction whose numerator is the number of months included in the taxable year and whose denominator is twelve.

(a) an amount equal to the sum of:

(1) Seven dollars per thousand upon the value of -

(i) its tangible property as determined to be taxable under paragraph 7 of section thirty if a tangible property corporation, or

(ii) its net worth as determined to be taxable under paragraph 9 of section thirty if an intangible property corporation; and

(2) Eight and thirty-three one hundredths per cent of its net income determined to be taxable in accordance with the provisions of this chapter.

(b) Four hundred dollars.

A foreign corporation shall not be subject to tax under this chapter if the foreign corporation is engaged in the business of selling tangible personal property and taxation of that foreign corporation under this chapter is precluded by the Constitution or laws of the United States, or would be so precluded except for the fact that the foreign corporation stored tangible personal property in a licensed public storage warehouse, provided, that no portion of any warehouse which is owned or leased by a consignor or consignee of the tangible personal property shall be deemed a licensed public warehouse.

264324-1

Supreme Court, U.S.
FILED
MAR 2 1998
OFFICE OF THE CLERK

No. 97-1242

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

---

KENNAMETAL, INC.,
*Petitioner*,

*v.*

COMMISSIONER OF REVENUE
OF MASSACHUSETTS,
*Respondent*.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

---

## RESPONDENT'S BRIEF IN OPPOSITION

---

SCOTT HARSHBARGER
*Attorney General*
*of Massachusetts*

THOMAS A. BARNICO*
*Assistant Attorney General*
1 Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200, ext.2086
**Counsel of Record*

## Question Presented

Whether the Massachusetts Supreme Judicial Court correctly concluded that technical assistance and other services rendered by a Pennsylvania manufacturer to its customers in Massachusetts exceeded the activities protected from state taxation by P.L. 86-272, 15 U.S.C. § 381 (1994).

## Parties

The petition correctly describes the parties to this case.

**Table of Contents.**


Page

TABLE OF AUTHORITIES . . . . . iii

OPINIONS BELOW . . . . . 2

JURISDICTION . . . . . 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED . . . . . 2

STATEMENT OF THE CASE . . . . . 2

REASONS FOR DENYING THE WRIT . . . . . 3

I. THE SUPREME JUDICIAL COURT CORRECTLY APPLIED *WRIGLEY* TO THE TECHNICAL ASSISTANCE PROVIDED BY KENNAMETAL TO ITS CUSTOMERS IN MASSACHUSETTS. . . . . 3

A. *Public Law 96-272 Does Not Protect Technical Assistance that Serves a Business Function Independent of the Solicitation of Orders.* . . . . . 4

B. *The Activities of Kennametal in Massachusetts Exceeded the Activities Protected by P.L. 86-272.* . . . . . 8

Page

II. THE PETITION FAILS TO SHOW A CONFLICT IN THE COURTS BELOW OR PRESENT AN ISSUE OF NATIONAL IMPORTANCE THAT MERITS REVIEW BY THIS COURT. . . . . 11

CONCLUSION . . . . . 14

Page

## Table of Authorities

### Cases

*BOC, Inc. v. Revenue Division, Dept. of Treasury*, 1993 WL 39624 (Mich. Ct. Cl.) . . . . . 11

*Briggs & Stratton Corp. v. State Tax Comm'n*, 3 Or. Tax 174, 1968 WL 207 . . . . . 12

*Brown Group Retail v. Franchise Tax Board*, 52 Cal. Rep. 202 (Cal. App. 1996) . . . . . 12

*Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) . . . . . 9n

*Clairol, Inc. v. Kingsley*, 262 A.2d 213 (N.J. Super. App.), *aff'd*, 270 A.2d 702 (N.J. 1970), *app. dism'd*, 402 U.S. 902 (1971) . . . . . 7, 12

*Hervey v. AMF Beaird, Inc.*, 464 S.W.2d 557 (Ark. 1971) . . . . . 13

**Page**

*Indiana Dep't of State Revenue v. Continental Steel Corp.*, 399 N.E.2d 754 (Ind. Ct. App. 1980) . . . . . 12

*In Re Woods*, 143 U.S. 202 (1892) . . . . . 3

*Iron Fireman Manufacturing Co. v. State Tax Commissioner*, 445 P.2d 126 (Or. 1968) . . . . . 12

*Kelly-Springfield Tire Company v. Bajorski*, 635 A.2d 771 (Conn. 1993) . . . . . 12

*Miles Laboratories, Inc. v. Dep't of Revenue*, 546 P.2d 1081 (Or. 1976) . . . . . 12

*Muro Pharmaceutical, Inc. v. Crystal*, 1994 WL 395266 (Conn. Super. 1994) . . . . . 11

*National Tires, Inc. v. Lindley*, 426 N.E.2d 793 (Ohio App. 1980) . . . . . 12

*Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959) . . . . . 5

*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) . . . . . 4

Page

*Rice v. Sioux City Cemetary*,
349 U.S. 70 (1955) . . . . . 13

*Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*,
505 U.S. 216 (1992) . . . . . *passim*

**Page**

**Massachusetts Statutes**

M.G.L.A. c. 63, § 38 (West 1988 and 1997 Supp.) . . . . . 4

M.G.L.A. c. 63, § 39 (West 1997 Supp.) . . . . . 4

**Federal Statute**

P.L. 86-272,
73 Stat. 555 (1959),
15 U.S.C. § 381 (1994) . . . . . *passim*

**Miscellaneous**

S. Rep. No. 658, 86th Cong.,
1st Sess. (1959),
*reprinted in* 1959
U.S. Code Cong. & Admin. News 2548 . . . . . 5

J. & W. Hellerstein,
*State Taxation* (1992) . . . . . 9

U.S. Supreme Court Rule 10 . . . . . 11

U.S. Supreme Court Rule 10(b) . . . . . 11

U.S. Supreme Court Rule 10(c) . . . . . 3, 9

U.S. Supreme Court Rule 15 . . . . . 1

No. 97-1242

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

KENNAMETAL, INC.,
*Petitioner*,

*v.*

COMMISSIONER OF REVENUE
OF MASSACHUSETTS,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

## RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to U.S. Supreme Court Rule 15, respondent Commissioner of Revenue of Massachusetts submits this brief in opposition to the petition for a writ of certiorari filed by petitioner Kennametal, Inc.

## OPINIONS BELOW

The opinions below are correctly cited in the petition.

## JURISDICTION

Petitioner invokes the jurisdiction of this Court to review the judgment of the Massachusetts Supreme Judicial Court under 28 U.S.C. § 1257 (a). The petition was docketed on January 27, 1998.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition correctly describes the constitutional and statutory provisions involved in this case. *See* Pet. App. 37a-42a.

## STATEMENT OF THE CASE

An accurate statement of the case appears in the decisions of the Massachusetts Appellate Tax Board ("the Board") and the Massachusetts Supreme Judicial Court. *See* Pet. App. 3a-11a and 24a-27a.

## REASONS FOR DENYING THE WRIT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Supreme Court Rule 10. The Court will grant such a writ "only for compelling reasons." *Id.* The purpose of certiorari jurisdiction is to permit the Court to select cases "of such gravity and general importance" as to warrant plenary review. *In re Woods*, 143 U.S. 202, 206 (1892). Accordingly, a "petition . . . is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Supreme Court Rule 10.

Kennametal claims that the decision below conflicts with one decision of this Court: *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992). For the reasons stated in this opposition, the decision below is consistent with *Wrigley* and, in any event, the petition does not satisfy the criteria that guide the Court's discretionary review. The petition should therefore be denied.

### I. THE SUPREME JUDICIAL COURT CORRECTLY APPLIED *WRIGLEY* TO THE TECHNICALASSISTANCE PROVIDED BY KENNAMETAL TO ITS CUSTOMERS IN MASSACHUSETTS.

United States Supreme Court Rule 10(c) provides that the Court may consider certiorari review when a state court "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions

of this Court." These factors are absent here because the decision of the Supreme Judicial Court follows directly from *Wrigley's* application of P.L. 86-272.

### A. *Public Law 86-272 Does Not Protect Technical Assistance that Serves a Business Function Independent of the Solicitation of Orders.*

Massachusetts General Laws Ann. c. 63, § 39 (West 1997 Supp.) imposes an excise on "every foreign corporation . . . actually doing business in the commonwealth. . . ." *Id.* The purpose of Section 39 is "to require the payment of th[e] excise to the commonwealth by foreign corporations for the enjoyment under the protection of the laws of the commonwealth, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation." *Id.* The net income of a corporation doing business in and outside Massachusetts is apportioned to Massachusetts by use of a three-factor formula set forth in M.G.L.A. c. 63, § 38 (West 1988 and 1997 Supp.).

Kennametal does not dispute that it was doing business in Massachusetts within the meaning of Section 39, or that there was a sufficient nexus between Kennametal and Massachusetts to support a tax under the Due Process and Commerce clauses. *See* Pet. App. 30a; *Quill Corp. v. North Dakota*, 504 U.S. 298, 305-313 (1992). Therefore, the only question presented by the petition is whether P.L. 86-272 protected Kennametal from the Massachusetts tax.

Public Law 86-272 provides in relevant part:

> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year

> ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such persons during such taxable year are either, or both of the following:
>
> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside this State; and
>
> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

15 U.S.C. § 381 (1994), codifying P.L. 86-272, § 101, 73 Stat. 555 (1959).

Public Law 86-272 was enacted in response to concerns expressed by businesses after the decision in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). *Northwestern States* held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." *Id.* at 452. The decision called into question the previously settled view that a State could not tax a foreign corporation on the basis solely of solicitation

of orders for the sale of their products. *See* S. Rep. No. 658, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. Code Cong. & Admin. News at 2549-51.

Public Law 86-272 "prohibits a State from taxing the income of a corporation whose only business activities within the State consist of the 'solicitation of orders' for tangible goods, provided that the orders are sent outside the State for approval and the goods are delivered from out-of-state." *Wrigley*, 505 U.S. at 216. The statute does not define the term "solicitation of orders." In its only application of the term, the Court in *Wrigley* acknowledged that the solicitation of orders "covers more than what is strictly essential to making requests for purchases" but drew a "clear line . . . between those activities that are *entirely ancillary* to requests for purchases -- those that serve no independent business function apart from their connection to the soliciting of orders -- and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force." *Id.* at 228-29 (emphasis in original)(footnote and citation omitted). Under this test, "[p]roviding a car and a stock of free samples to a salesman is part of the 'solicitation of orders,'" because it serves no purpose other than "to facilitate requests for purchases." *Id.* at 229. In contrast,

> employing salesmen to repair or service the company's products is not part of the "solicitation of orders," since there is good reason to get that done whether or not the company has a sales force. Repair and servicing may help to *increase* purchases; but it is not ancillary to *requesting purchases*, and cannot be converted into "solicitation" by merely being assigned to salesmen.

*Id.* (footnote and citation omitted)(emphasis in original). The Court rejected as too broad the argument of the taxpayer that the term "solicitation of orders" includes any activities "routinely associated with" or "customarily performed by salesmen." *Id.* at 227-28. The Court rejected this approach because it "converts a standard embracing only a particular activity ('solicitation') into a standard embracing all activities routinely conducted by those who engage in that particular activity ('salesmen')." *Id.* at 227.

*Wrigley* also addressed in a footnote the question of technical assistance to customers. *Id.* at 224 n.2 (citing *Clairol, Inc. v. Kingsley*, 262 A.2d 213 (N.J. Super. App.), *aff'd*, 270 A.2d 702 (N.J. 1970), *app. dism'd*, 402 U.S. 902 (1971)). *Clairol* had considered the activities of two types of representatives of a beauty products company. 262 A.2d at 217. The first type visited retailers, reviewed Clairol product displays, gave free samples, and made suggestions for orders. *Id.* The second type visited salons and instructed beauticians on how to use Clairol products after purchase. *Id.* The New Jersey court upheld the tax. 262 A.2d at 217-18. The Court in *Wrigley* stated that, whether or not *Clairol* applied the correct standard under P.L. 86-272, the judgment of the New Jersey court "would have been the same" under the *Wrigley* test, "since the company's in-state activities included sending non-sales representatives *to provide customers technical assistance in the use of Clairol products*." 505 U.S. at 224 n. 2 (emphasis added).

Thus, *Wrigley* establishes that (1) activities are protected only if they are entirely ancillary to the solicitation of orders, and (2) technical assistance and similar activities are not protected if they serve an independent business function.

### B. *The Activities of Kennametal in Massachusetts Exceeded the Activities Protected by P.L. 86-272.*

The record below amply supported the conclusions of the Board and the Supreme Judicial Court that the activities of Kennametal personnel in Massachusetts exceeded the activities protected by P.L. 86-272. The record showed that Kennametal field personnel (1) created "Tool Performance Reports" and other means to improve customer productivity; (2) provided inventory management and control services known as "Consultant Tool Management" or "Standardization"; (3) gave technical advice and in-plant training in the use of Kennametal products; and (4) resolved customer complaints, sometimes with personnel sent from outside Massachusetts. *See* Pet. App. 4a-11a, 25a-27a.

The Board found that "[t]o the extent it is a finding of fact, . . . the[se] activities of Kennametal employees served an independent business function and were not entirely ancillary to the solicitation of orders." Pet. App. 11a. The Board further found that, "[a]lthough such technical advice and studies may help to increase purchases, they are not ancillary to requesting purchases since there is an independent business reason to provide advice on the proper use of its product regardless of whether Kennametal had a sales force." *Id.*

The Supreme Judicial Court applied *Wrigley* to the facts found by the Board and affirmed. The court stated that the company "had reasons independent of soliciting orders that motivated it to provide the activities in question . . . . For example, the proper use of [the company's] products improves performance and enhances the company's reputation among

buyers." Pet. App. 34a. The court concluded that these activities "cannot be viewed as entirely ancillary to requests for purchase, but rather as serving an independent business function as well." *Id.* Accordingly, the Court held that the Board "reasonably could conclude that presentations made in front of 200 employees were primarily intended, generally, to increase sales rather than directly to facilitate the solicitation of orders." *Id.* at 36a.

These conclusions correctly applied *Wrigley* to the facts found by the Board. "To treat such servicing and teaching operations, although they will, of course, affect future orders, as a mere 'incident' to solicitation, is to stretch that term beyond its normally understood scope." J. & W. Hellerstein, *State Taxation* ¶ 6.13[1][c], p. 6-42 (1992)(discussing *Wrigley* and *Clairol*, *supra*). Because the court below correctly applied *Wrigley*, there is no basis for a claim that the state court "decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Supreme Court Rule 10(c).[1]

---

[1] Kennametal argues that the Supreme Judicial Court erred by describing unprotected activities as including those intended "to ingratiate customers and to assist buyers in knowing what to order." *See* Pet. 10, 14, 18-21; Pet. App. 34a. There is no conflict between this isolated statement and *Wrigley* because the Supreme Judicial Court plainly applied the crucial "independent business function" test applied in *Wrigley*. In some circumstances, solicitation may include certain "ingratiating" conduct, but that does not mean that the court below could not use the same term to describe one of the *purposes* of the technical assistance provided by Kennametal -- assistance that plainly exceeded solicitation. *Cf. Chevron U.S.A. v. Natural*

Moreover, the decisions below are supported by application of the even more protective standard set forth in the *Wrigley* dissent. The dissent rejected the rule applied by the majority on the ground that such a rule "condemns business activities that are bound to solicitation and do not possess *independent value* to the customer apart from what often accompanies a successful solicitation." 505 U.S. at 246 (emphasis added). According to the dissent, the activities of the *Wrigley* personnel were "not activities that can be said to have provided their own component of *significant value*." *Id.* (emphasis added).

Kennametal knows a good deal about adding value to a product. Its 1989 annual report stated:

> We are building on Kennametal's success by "adding value" to our products. Every time customers open a Kennametal package, they get more than the product; they gain access to all of Kennametal's global resources. Our technically knowledgeable direct sales force, our ongoing investment in research and development, and our advanced customer service systems are elements of the "something extra" customers get when they buy from Kennametal.

Board Jt. Ex. YY-14 at 5. The decisions below reasonably held Kennametal to the tax consequences of these claims.

At most, the petition presents only an alleged "misapplication of a properly stated rule of law." U.S. Supreme Court Rule 10. Indeed, Kennametal concedes that the "determination of whether an activity is entirely ancillary to

---

*Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)(Court "reviews judgments, not opinions").

requests for purchases is made by considering the facts and circumstances in each case" (Pet. 13), and argues that the "Massachusetts court *misapplied* [the *Wrigley*] analysis in reaching a decision contrary to the letter and spirit of . . . *Wrigley*." Pet. 11 (emphasis added). A petition resting on these grounds is "rarely granted," (U.S. Supreme Court Rule 10), and should not be granted here.

## II. THE PETITION FAILS TO SHOW A CONFLICT IN THE COURTS BELOW OR PRESENT AN ISSUE OF NATIONAL IMPORTANCE THAT MERITS REVIEW BY THIS COURT.

Kennametal does not claim that the Supreme Judicial Court "has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." U.S. Supreme Court Rule 10(b). In fact, the decision below is consistent with the overwhelming majority of state decisions before and after *Wrigley* that have addressed the issue of technical assistance.

In *Muro Pharmaceutical, Inc. v. Crystal*, 1994 WL 395266, *5 (Conn. Super. 1994), for example, the court construed *Wrigley's* citation to *Clairol* to mean that the Court "was plainly focusing on the more technical type of representative who told beauticians how to use Clairol products." *Id.* (P.L. 86-272 forecloses tax where drug sales representatives merely gave doctors description of product and copies of articles in medical journals). Similarly, in *BOC, Inc. v. Revenue Division, Dept. of Treasury*, 1993 WL 39624 (Mich. Ct. Cl.), the court held that sales representatives who held training sessions for purchasers of their product -- a "vaporizer" attached to

inhalation machines used by hospital anesthesia departments -- exceeded the solicitation of orders. *Id.* at *3. BOC personnel "engaged in training medical personnel," "furnishing the students with 'care' packages" and "arrang[ing] for various guest lecturers at these training sessions." *Id.* at *1. Though such training did "serve[] to create goodwill and advertise Plaintiff's product," the court concluded that the training was not ancillary to sales because there was "good reason to get that [training] done whether or not the company has a sales force." *Id.* at 2. The court stated that P.L. 86-272 does not protect "technically trained . . . persons who perform a multitude of tasks" just because one of those tasks happens to be "sales." *Id.*; *see also Brown Group Retail v. Franchise Tax Board*, 52 Cal. Rep. 202, 210-11 (Cal. App. 1996)(advice on operations of retail stores exceeded solicitation of orders); *Kelly-Springfield Tire Company v. Bajorski*, 635 A.2d 771 (Conn. 1993)(visits by credit managers exceeded solicitation of orders because "[l]ike repairs and servicing, proper credit practices to monitor the collectibility of payments due from dealers . . . are not themselves ancillary to 'requests for purchases'").

Likewise, even before *Wrigley*, state courts had held that certain forms of technical assistance or advice forfeited immunity under P.L. 86-272. *See Clairol, Inc. v. Kingsley*, *supra*; *Briggs & Stratton Corp. v. State Tax Comm'n*, 3 Or. Tax 174, 1968 WL 207; *Miles Laboratories, Inc. v. Dep't of Revenue*, 546 P.2d 1081, 1083 (Or. 1976) (handling customer complaints); *Iron Fireman Manufacturing Co. v. State Tax Commissioner*, 445 P.2d 126, 128 (Or. 1968)("almost constant interchange and pooling of talents, resources and expertise in the engineering, manufacturing, installation, and testing of parts furnished by taxpayer"); *Indiana Dep't of State Revenue v. Continental Steel Corp.*, 399 N.E.2d 754, 759 (Ind. Ct. App.

1980)(handling customer complaints); *National Tires, Inc. v. Lindley*, 426 N.E.2d 793, 795, 798 (Ohio App. 1980)(inventory management and control services); *Hervey v. AMF Beaird, Inc.*, 464 S.W.2d 557 (Ark. 1971)(same). While some of these pre-*Wrigley* cases might have applied a test different from *Wrigley*, *Wrigley's* discussion of *Clairol* makes clear that both before and after *Wrigley*, even modest technical assistance is enough to forfeit immunity under P.L. 86-272. In sum, there is no basis for a claim that the decision below is inconsistent with the decisions of other state courts.

Finally, the Court should not grant the petition on the basis of Kennametal's prediction that the decision below "will create confusion for other state and federal courts interpreting *Wrigley* in the future." Pet. 25. This prediction is undercut by Kennametal's own view that cases under P.L. 86-272 concerning technical assistance will continue to turn upon "the facts and circumstances of each case." Pet. 13. In addition, Kennametal's failure to allege a conflict in the lower courts suggests that *Wrigley* and its discussion of *Clairol* have established an adequate standard for past and future use by the lower courts. In any event, Kennametal's speculation about future conflicts in the lower courts does not support plenary review at this time. *See Rice v. Sioux City Cemetary*, 349 U.S. 70, 79 (1955)(conflict in lower courts will not justify review unless it is "*real* and embarrassing")(emphasis added)(citation omitted).

## CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

MITCHELL ADAMS
COMMISSIONER OF REVENUE
OF MASSACHUSETTS

By his attorneys,

SCOTT HARSHBARGER
ATTORNEY GENERAL

Thomas A. Barnico
Assistant Attorney General
*Counsel of Record*
One Ashburton Place
Boston, MA 02108
(617) 727-2200, ext. 2086

Dated: March 2, 1998

F:\USERS\BARNIT\WPWIN60\WPDOCS\KENNAMET\KENNOPP.WPD